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DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBERS 97-0157-ST, 97-0158-ST, 97-0159-ST
Sales/Use Tax
For The Period: 1993, 1994 and 1995**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax - Telephone Access Charges

Authority: IC 6-2.5-4-6, IC 6-2.5-2-1, IC 6-2.5-4-4, 45 IAC 2.2-4-8, Greensburg Motel v. DOSR, 629 N.E.2d 1302 (Ind. Tax 1994)

Taxpayer protested a proposed assessment of sales tax on the access charge for guest use of local telephone.

II. Sales/Use Tax - Purchase of Food for Human Consumption

Authority: IC 6-2.5-5-20

Taxpayer protested a proposed assessment of sales/use tax on the purchase of food for a guest's gratuitous breakfast.

STATEMENT OF FACTS

Taxpayer is engaged in the hotel business at three locations in Indiana. The audit covered all locations but the proposed assessment of sales/use tax is not common to all locations. Taxpayer's hotels do not have a traditional restaurant but rather provide their guests a continental breakfast. The food provided consist of pastries, fruit, juice, donuts, and coffee. It is available to a hotel

guest in the hotel lobby area. The accommodation charge to guests is the same whether or not they partake of the breakfast food.

Each hotel room contains a telephone. Taxpayer imposes a \$0.50 charge per long distance call made by a guest from the room telephone. Taxpayer calls this an access charge and it is in addition to any long distance charges. Further, it is separately stated on the room bill.

I. Telephone Access Charges

DISCUSSION

IC 6-2.5-4-6(b) provides:

A person is a retail merchant making a retail transaction when the person:

- (1) furnishes or sells an intrastate telecommunication service; and
- (2) receives gross retail income from billings or statements rendered to customers.

The fee charged by the taxpayer to its guests for access to the telecommunication services is subject to sales/use tax to be collected by the taxpayer as provided by IC 6-2.5-4-4 and 45 IAC 2.2-4-8. 45 IAC 2.2-4-8 states that every person renting or furnishing rooms, lodgings or other accommodations for periods of less than thirty (30) days must collect the gross retail tax on the gross receipts from such transactions. 45 IAC 2.2-4-8 further states, "The gross receipts subject to tax include the amount which represents consideration for the rendition of these services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice." In the instant case, the taxpayer's provision of access to telephone services for its guest is a service regularly provided in furnishing an accommodation by the taxpayer, hence, the fee for same is defined as gross receipts received from furnishing accommodations for periods of less than thirty (30) days and is subject to sales/use tax.

This conclusion results in the taxpayer paying sales/use tax on the purchase of telecommunication services and its guests paying sales/use tax on the access fee. This is not at all inconsistent with the Indiana Tax Court's opinion on this issue. In Greensburg Motel v. Dept of State Revenue, 629 N.E.2d 1302 (Ind. Tax 1994), the taxpayer (a motel owner and operator) argued that tax pyramiding occurs in its industry because they (hotels, motels, etc.) are providing a taxable service and are not exempt from sales tax on their purchases of consumable items, non-consumable items, and utilities. The Court simply stated, "Not every purchase incorporated into service is exempt from sales tax."

FINDING

Taxpayer protest is denied.

II. Purchase of Food for Human Consumption

DISCUSSION

Taxpayer's position, simply stated, is that IC 6-2.5-5-20 provides that the sale of food for human consumption is exempt from sales tax. Taxpayer explains subsection (c)(8) as applicable only to restaurant meals and not hotel meals and cites language out of Taxpayers Lobby of Indiana v. Orr, 311 N.E.2d 814 (1974). Taxpayer would have the Department rule based upon the "legislative intent" of (c)(8). However, taxpayer fails to recognize the posture Taxpayers Lobby was in when decided by the Indiana Supreme Court. The case was before the court on a constitutional question, not on what effect to give ambiguous terms in a statute. Thus, legislative intent is not an issue but rather is there a reasonable or rational basis for the food classification exemption, i.e. can the tax treatment of eating out be different from groceries. Without belaboring the point the court said yes, and here the bottom line is whether the hotel guests are eating out or consuming groceries. The answer is obvious.

FINDING

Taxpayer protest is denied.